Guideline Sentencing Update

FEDERAL JUDICIAL CENTER

Guideline Sentencing Update will be distributed periodically by the Center to inform judges and other judicial personnel of selected federal court decisions on the sentencing reform legislation of 1984 and 1987 and the Sentencing Guidelines. Although the publication may refer to the Sentencing Guidelines and policy statements of the U.S. Sentencing Commission in the context of reporting case holdings, it is not intended to report Sentencing Commission policies or activities. Readers should refer to the Guidelines, policy statements, commentary, and other materials issued by the Sentencing Commission for such information.

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Violation of Probation

REVOCATION FOR DRUG POSSESSION

Supreme Court resolves circuit split, holds that the minimum sentence after revocation of probation for drug possession is one-third of the original guideline maximum. Defendant was originally subject to a guideline range of 0–6 months' imprisonment, and was sentenced to a 60-month term of probation. He violated probation by possessing cocaine and was subject to 18 U.S.C. § 3565(a), which states that for "possession of a controlled substance . . . the court shall revoke the sentence of probation and sentence defendant to not less than one-third of the original sentence." The district court interpreted "original sentence" to mean one-third of the probation term, and sentenced defendant to prison for 20 months. The appellate court reversed, holding that "one-third of the original sentence" should be read to mean the maximum sentence available under the original guideline range; thus, defendant should have been sentenced to "not less than" 2 months, with a maximum sentence of 6 months. *See U.S. v. Granderson,* 969 F.2d 980 (11th Cir. 1992). [See *Outline* at VII.A.2 for other circuit holdings.]

The Supreme Court affirmed the appellate court. "According the statute a sensible construction, we recognize, in common with all courts that have grappled with the 'original sentence' conundrum, that Congress prescribed imprisonment as the *type* of punishment for drug-possessing probationers. As to the *duration* of that punishment, we rest on the principle that '"the Court will not interpret a federal criminal statute so as to increase the penalty . . . when such an interpretation can be based on no more than a guess as to what Congress intended."' . . . The minimum revocation sentence, we hold, is one-third the maximum of the originally applicable Guidelines range, and the maximum revocation sentence is the Guidelines maximum."

Two justices concurred in the judgment only, and two justices dissented.

U.S. v. Granderson, No. 92-1662 (U.S. Mar. 22, 1994) (Ginsburg, J.).

Outline at VII.A.2.

Violation of Supervised Release

SENTENCING

U.S. v. Anderson, 15 F.3d 278 (2d Cir. 1994) (Affirmed: After revocation of supervised release, defendant was subject to a statutory maximum of 24 months' imprisonment and a range of 6–12 months under Guidelines Chapter 7. The district court sentenced her to 17 months, stating that it departed from the Guidelines because defendant needed "intensive substance abuse and psychological treatment in a structured environment." The appellate court held that the prohibition in 18 U.S.C. § 3582(a), "that imprisonment is not an appropriate means of promoting correction and rehabilitation" (see also 28 U.S.C. § 994(k)), does not apply to sentencing after revocation of supervised release under 18 U.S.C. § 3583(e). "In determining the length of a period of supervised release, . . . a district court may consider such factors as the medical and correctional needs of the offender. . . . Because [of that], and because a district court may require a person to serve in prison the period of supervised release, the statute contemplates that the medical and correctional needs of the offender will bear on the length of time an offender serves in prison following revocation . . . . We conclude, therefore, that a court may consider an offender's medical and correctional needs when requiring that offender to serve time in prison upon the revocation of supervised release." (Kearse, J., dissented.)

The court also "declined to extend *Williams [v. U.S.,* 112 S. Ct. 1112 (1992),] to Chapter 7 policy statements," and reaffirmed its pre-*Williams* holding that "Chapter 7 policy statements are advisory, rather than binding. . . . Accordingly, the district court need not 'make the explicit, detailed findings required when it departs from a binding guideline,' . . . [and] we will affirm the district court's sentence provided (1) the district court considered the applicable policy statements; (2) the sentence is within the statutory maximum; and (3) the sentence is reasonable." The court found those conditions were met and affirmed the sentence.).

Outline at VII and VII.B.1.

Criminal History

OTHER SENTENCES OR CONVICTIONS

U.S. v. Thomas, No. 92-2112 (8th Cir. Mar. 10, 1994) (en banc) (Hansen, J.) (four judges dissenting) (Affirmed: District court may consider constitutionally valid but uncounseled prior misdemeanor conviction in determining Guidelines sentence. Under *Baldasar v. Illinois,* 446 U.S. 222 (1980) (per curiam), "one cannot be sent to jail because of a prior uncounseled misdemeanor conviction, either upon the initial conviction or because of the conviction's later use in a subsequent sentencing, but if the subsequent sentence to imprisonment is already required as a consequence of the subsequent crime, the prior conviction may be used as a factor to determine its length.").

Outline at IV.A.5.

CAREER OFFENDER PROVISION

U.S. v. Heim, 15 F.3d 830 (9th Cir. 1994) (Affirmed: Disagreeing with *U.S. v. Price,* 990 F.2d 1367 (D.C. Cir. 1993) [5 *GSU* #12], and holding that "the Sentencing Commission did not exceed its statutory authority in including conspiracy within the meaning of 'controlled substance offense' in §§ 4B1.1 and 4B1.2.").

Outline at IV.B.2.

U.S. v. Baker, 16 F.3d 854 (8th Cir. 1994) (Remanded: District court erred in holding that defendant's 21 U.S.C. § 856 conviction for managing or controlling a "crack house" was a "controlled substance offense" for career offender purposes under § 4B1.2(2). Although managing a residence for the purpose of *distributing* a controlled substance would

qualify, managing a residence for the purpose of *using* drugs does not, and the jury's verdict was ambiguous—"it does not clarify whether Baker was convicted of a possession § 856 offense or a distribution § 856 offense. When a defendant is convicted by an ambiguous verdict that is susceptible of two interpretations for sentencing purposes, he may not be sentenced based upon the alternative producing the higher sentencing range.").
Outline at IV.B.2.

Challenges to Prior Convictions

U.S. v. Mitchell, No. 92-3903 (7th Cir. Feb. 23, 1994) (Flaum, J.) (Affirmed: "[W]e agree with the result reached by the First, Fourth, Sixth, Eighth, and Eleventh Circuits, and hold that a defendant may not collaterally attack his prior state conviction at sentencing unless that conviction is presumptively void, . . . that is a conviction lacking constitutionally guaranteed procedures plainly detectable from a facial examination of the record." The court also determined that, although it and other circuits had found that early versions of Application Note 6 to § 4A1.2 indicated such challenges should be allowed, amendments to the commentary in Nov. 1990 and later have made it clear that the Sentencing Commission did not intend to enlarge a defendant's right to collaterally attack a prior conviction "beyond any right otherwise recognized by law.").
Outline at IV.A.3.

Departures

Criminal History

U.S. v. Fletcher, 15 F.3d 553 (6th Cir. 1994) (Affirmed: Downward departure for career offender—to his offense level before career offender designation and criminal history category V instead of VI—was appropriate. "Fletcher argued that his case was ripe for a downward departure because of his extraordinary family responsibilities, the age of the convictions on his record (1976 and 1985), the time intervening between the convictions, and his attempts to deal with his drug and alcohol problems. Moreover, Fletcher specifically requested the court to compare him 'to other defendants who would typically be career offender material.' Fletcher also argued that the court should consider his 'likelihood of recidivism' in light of his success in rehabilitating himself." The appellate court held "that these circumstances present a satisfactory basis for a downward departure. Fletcher's unrelated past convictions, . . . the type of convictions, his attempts to deal with his alcohol problems, . . . the age of the convictions, and Fletcher's responsibilities to his parents are circumstances that indicate that the seriousness of Fletcher's record and his likelihood of recidivism were over-stated by an offense level of 32 and a criminal history category of VI. . . . While we note that the age of Fletcher's convictions, standing alone, does not warrant a downward departure, a district court may take the age of prior convictions into account when considering a defendant's likelihood of recidivism.").
Outline at VI.A.2.

Mitigating Circumstances

U.S. v. Monk, 15 F.3d 25 (2d Cir. 1994) (Remanded: Defendant, convicted of simple possession of crack but acquitted of possession with intent to distribute, was sentenced to 135 months. The district court concluded that it had no power to depart, although it wanted to because "the interests of justice require it, given the rather harsh result on the facts of this case" due to the inclusion of relevant conduct in setting the offense level. The appellate court concluded that "the sentencing judge failed to appreciate his authority to depart under [18 U.S.C.] § 3553(b). *See U.S. v. Concepcion*, 983 F.2d 369, 385–89 (2d Cir. 1992) (where relevant conduct guideline would require extraordinary increase in sentence by reason of conduct for which defendant was acquitted by jury, district court has power to depart downward) . . . . We repeat that when there are compelling considerations that take the case out of the heartland factors upon which the Guidelines rest, a departure should be considered.").
Outline generally at VI.C.4.

U.S. v. Sharapan, 13 F.3d 781 (3d Cir. 1994) (Remanded: District court could not grant downward departure "because of its concern that incarceration of the appellee would cause his business to fail and thereby result in the loss of approximately 30 jobs and other economic harm to the community. We hold that this departure is inconsistent with U.S.S.G. § 5H1.2, which provides that departures based on a defendant's 'vocational skills' are generally not permitted." The court added that "we see nothing extraordinary in the fact that the imprisonment of [the business's] principal for mail fraud and filing false corporate tax returns may cause harm to the business and its employees. The same is presumably true in a great many cases in which the principal of a small business is jailed for comparable offenses.").
Outline at VI.C.1.e.

Determining the Sentence

Supervised Release

U.S. v. Porat, No. 93-1095 (3d Cir. Mar. 3, 1994) (Roth, J.) (Remanded: Home detention was available as a condition of supervised release under § 5C1.1(d) and (e)(3), but the district court could not allow it to be served in Israel. "Having determined that home detention is suitable in this particular instance, there must be assurance that the defendant complies with his sentence. To do so, the probation office must closely monitor his actions. In order that the probation office effectively perform its responsibilities, we believe that Porat must serve his home detention in the United States. It is not clear that the probation office could properly insure that Porat is complying with his sentence if he is allowed to serve his term of supervised release in Israel.").
Outline generally at V.C.

Note to readers:

The latest revision of *Guideline Sentencing: An Outline of Appellate Case Law on Selected Issues*, which supersedes the August 1993 issue, has been printed and is being mailed to all recipients of *Guideline Sentencing Update*. Please note the following changes that should be made to your copy:

VII.F.1.b.ii - *U.S. v. Hernandez*, 996 F.2d 62 (5th Cir. 1993), was modified March 7, 1994, to be reprinted at 17 F.3d 78. Please delete the sentence and quote that immediately precedes the citation on p. 87 of the *Outline*. The holding of the case did not change. Also, the citation for *Hernandez* in VI.F.1.a on p. 85 should be changed to 17 F.3d 78.

IX.D.4 - At p. 100, *U.S. v. Tincher*, 8 F.3d 350 (8th Cir. 1993), was withdrawn and replaced by an unpublished per curiam opinion listed at 14 F.3d 603.